IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 4057

UNITED STATES OF AMERICA *ex rel.* L. B. BINION,
Petitioner,

v.

UNITED STATES MARSHAL FOR THE DISTRICT OF NEVADA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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L. B. Binion, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on June 26, 1961.

OPINIONS BELOW

The opinion of the United States District Court for the District of Nevada (R. 11-24)* is reported at 188

* References prefixed "R" are to the printed Transcript of Record filed in the court below.

F. Supp. 905. The opinion of the Court of Appeals for the Ninth Circuit (Appendix A, *infra*, pp. 1a-8a) is not yet reported. The opinion of the United States Court of Appeals for the Third Circuit (Appendix E, *infra*, pp. 14a-20a) is reported at 273 F. 2d 495. The opinion of the United States District Court for the Eastern District of Pennsylvania is not reported (Appendix F, *infra*, pp. 20a-26a).

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*, p. 8a) was entered on June 26, 1961. A timely petition for rehearing was denied on August 4, 1961 (Appendix C, *infra*, p. 9a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

The constitutional provision, statutes, and rules involved are set out in (Appendix D, *infra*, pp. 9a-13a).

QUESTIONS PRESENTED

1. Whether, after one Court of Appeals had determined that a prisoner has earned 50 days towards service of a sentence, and a District Court in another circuit holds that he has not earned those fifty days, the second Court of Appeals may properly refuse to consider the correctness of the first Court of Appeals' determination, thus leaving the Government's custodial officers without appropriate guidance as to the proper release date, and requiring the prisoner to bring another habeas corpus to determine the issue.

2. Where a United States District Court discharged petitioner in a habeas corpus action and he was released without bail and not on his own recognizance, does his sentence of imprisonment continue to run until the United States files notice of appeal so that, even

though the District Court is subsequently reversed, petitioner is entitled to credit toward the balance of his sentence for that time?

3. Where a United States District Court discharged petitioner in a habeas corpus action on the ground that he had completely served a prison sentence, did the Court of Appeals (Third Circuit) have jurisdiction to determine that petitioner is entitled to some credit toward his sentence even though not enough to warrant immediate discharge from custody?

4. Where petitioner, concurrently serving two sentences, one for probation and a second for a prison term, is released from prison on bail pending post-conviction proceedings testing the validity of the conviction underlying the prison term and is compelled by his probation officer to report not only as required by the terms of the probation order but in addition to report in the same manner as one on parole or conditional release, is petitioner entitled to credit toward his prison sentence as a matter of simple equity and of Due Process of Law under the Fifth Amendment for the full period of time during which he was subject to the unlawful restraints imposed by the probation officer and for the time elapsed between his efforts to surrender and the date he was taken into custody.

STATEMENT

A. Petitioner's original confinement, release on bail, surrender, and release on habeas corpus by the District Court for Eastern Pennsylvania.

On September 3, 1952, petitioner pleaded *nolo contendere* to an indictment found in the District of Nevada alleging a violation of Sec. 145(b), I.R.C. 1939, for the year 1949. The sentence was a fine, which was paid, and probation for a period of five years, the condition of which was that petitioner should report every 60 days to the federal probation officer. There was no violation of any conditions of this probation (R. 50, 65).

Thereafter, on December 14, 1953, petitioner pleaded guilty to two indictments found in the Western District of Texas, alleging violations of § 145(b), I.R.C. 1939, for the years 1947 and 1948. The sentence was a fine of $20,000, which was paid, and concurrent sentences of five years' imprisonment, to be followed by three years of probation. Petitioner was immediately committed (R. 54-47), and received at the United States Penitentiary at Leavenworth, Kansas, on December 19, 1953 (R. 50, 78).

Following the decision in *Berra* v. *United States*, 351 U.S. 131, 133, where both parties agreed that § 3616(a), I.R.C. 1939, applied to income tax returns, petitioner in August 1956 moved under 28 U.S.C. § 2255 to correct his Texas sentence on the ground that it was excessive under § 3616(a). This motion being denied, and bail pending appeal being denied by two courts (R. 50-51), petitioner applied to this Court for bail, which was granted over the Government's objection (352 U.S. 1028).

Petitioner furnished the required bond (R. 54-59), and, on March 19, 1957, was released from prison (R. 51, 60-61, 78). On that date, he had three months and 20 days left to serve (R. 31a).

Subsequently this Court held in *Achilli* v. *United States*, 353 U.S. 373, that § 3616(a) did not apply to income tax cases. Thereafter, the Fifth Circuit affirmed the denial of petitioner's motion to correct his sentence (*Binion* v. *United States*, 245 F. 2d 466), and on October 14, 1957, this Court denied certiorari to review that holding. 355 U.S. 834. Promptly thereafter, on October 16, petitioner surrendered to the United States Marshal in Philadelphia. (R. 51-52.)

Immediately following, petitioner brought habeas corpus. The District Court (Welsh, J.) issued the writ on the following day after a preliminary hearing, and released petitioner on bail, later writing a comprehensive opinion sustaining the writ. (R. 48-49; Appendix E, *infra*, pp. 20a-26a).

B. Restraints imposed on petitioner while released on bail, March 19 to October 23, 1957.

From March 21, 1957, two days after his release from Leavenworth, until October 23, 1957, five days after his release from the custody of the United States Marshal at Philadelphia by order of Judge Welsh, petitioner reported to Mr. Hubert A. Boyd, the Chief U. S. Probation Officer in Las Vegas, Nevada, who, in addition to requiring him to report every 60 days under the terms of his 1952 Nevada sentence, also required him to report by personal contact not less than once a week during this period. Petitioner reported faithfully and conscientiously throughout, just as any parolee or conditional releasee (R. 71, 75-77).

The Probation Officer's Contact Log (R. 61-64) shows that on March 21, 1957 he instructed petitioner to report and register, and that two days later petitioner reported in person (R. 61). For the next six months, according to the Probation Officer, petitioner was "under close supervision" (R. 65).

According to the Probation Officer (R. 75),

> "This case was handled in the same manner as any person who has been released from a penitentiary under supervision of a parole officer.
>
> "First, he was under supervision of this officer by reason of the probation imposed upon him on September 3, 1952, which terminated September 13, 1957. [This was pursuant to the Nevada sentence, see R. 50.]
>
> "Secondly, in addition to the requirements of probation, I required L. B. Binion to report by personal contact not less than once a week from his release date of March 19, 1957 until October 23, 1957. Therefore, Binion reported to me in the same manner as I would require a parolee or CR [conditional releasee] to report for supervision. This was particularly required of Binion because no information was available relative to his status."

On September 3, 1957, the five year probationary period imposed by the U. S. District Court for Nevada (R. 50) ended by its terms. The events that followed are reflected by the following entries in the log of Chief U. S. Probation Officer Boyd (R. 63):

> "9- 3-57—Termination date of Probation. Court not in session on CR matters until Friday, September 13. Informed Mrs. Binion I would present motion at that time.

"9-13-57—Probation terminated at Carson City.

"9-17-57—Letter written to Binion relative to termination of probation.

"9-19-57—Binion reported that the had received letter and information on termination of probation and asked if he should continue submitting reports.

I advised him to continue reporting until I had written to the Parole Board and to Mr. Gilpin, CUSPO at San Antonio, Texas for advice."

Boyd wrote two letters on September 19, as he had recorded in the log.

One letter, to Chief U. S. Probation Officer Gilpin of the Western District of Texas—the sentence from which Binion was released on bail by this Court (R. 50-51, 52-61)—read in pertinent part as follows (R. 6-67):

"The above named subject has completed his probationary period in the District of Nevada in a satisfactory manner, and the proceedings were terminated on September 13, 1957. * * *

"I am not aware as to whether or not I am to consider the subject as serving under Conditional Release or Parole, or if he is to be immediately placed under active supervision in the Western District of Texas.

"Binion is living here in Las Vegas, expects to make this his home and will be in business in this District.

"Do you wish to have the probationer continue submitting written reports to my office?"

Probation Officer Gilpin replied on the following day (R. 67-68):

> "As soon as Mr. Binion completes his parole or his conditional release supervision which ever his status may be, his three-year period of probation supervision will then begin. When you receive a reply to your letter of September 19, 1957 addressed to Mr. McDermott and determine Mr. Binion's status from the standpoint of the termination date of such status, I will appreciate hearing from you relative to transfer of probationer's file."

Boyd's second letter of September 19 was addressed to Mr. William K. McDermott, Parole Executive, United States Board of Parole. It read, in pertinent part (R. 64-66):

> "The above named subject has been reporting to this office since his release date from prison on March 19, 1957, and been under close supervision * * *.
>
> "Mr. Binion has reported to me since termination of his probation in Nevada and stated that he did not wish to be in any violation of the Law, and asked if he should submit written reports to this or any other office.
>
> "I would appreciate being instructed as to how I should proceed with this matter."

Probation Officer Boyd's log reflects the concern felt by petitioner over Mr. McDermott's delay in replying to the foregoing inquiry (R. 63-64):

> "9-23-57—Notified Binion to keep reporting to me until I hear from the Parole Board. Subject expressed concern over the fact that he did not want to violate any rules by not reporting.

"9-27-57—Advised Binion that I expected to hear shortly from the Parole Board and to keep reporting once or twice a week until further advised.

"10-4-57—Subject reported and expressed concern over not having heard from the parole Board relative to his status."

Petitioner filed his first petition for a writ of habeas corpus immediately thereafter, on October 16, and the writ was granted the next day with petitioner's bail fixed at $5000 pending a hearing (R. 48).

Four days later, on October 21, 1957, Mr. McDermott, the Parole Executive, *finally* replied to Probation Officer Boyd's September 19 inquiry (R. 68-69). After stating that reports made by petitioner to Probation Officer Boyd since March 19 "have not been made on the basis of any request or order by the United States Board of Parole since no action granting parole has been entered in Mr. Binion's case," Mr. McDermott continued:

> "We have received information to the effect that Mr. Binion surrendered himself to the United States Marshal on October 16, 1957, for return to confinement but subsequently filed a writ in order to contest this matter, and we believe that he has been released on $5,000 bailed for subsequent hearing on the writ. Since he is not considered to be in custody of the Attorney General while out on bail, there will be no requirements as far as the Board of Parole is concerned for any reporting to your office."

The last reports made by petitioner, following his release on bail by the United States District Court

for the Eastern District of Pennsylvania, appear in Probation Officer Boyd's log as follows (R. 64):

> "10-20-57—Subject reported.
> "10-23-57—Received word from Parole Board that subject is not required to submit reports to this office. I so advised Binion."

As has been indicated the latter court (Welsh, D.J.) sustained the writ, saying (Appendix F, *infra*, pp. 23a, 24a):

> "The heart of the matter is that, when relator was released on bond by order of the Supreme Court he was under no restraint other than the usual limitation of action imposed on one released on bail. But, the Nevada Probation Officer required relator to report in the same manner as a parolee from March 19, 1957, to October 23 1957, a period far greater than the three months and eighteen days remaining to be served under his sentence. Since reporting on parole is an ameliorated imprisonment, unless other factors in this case affect our judgment, we believe that relator earned confinement time during that period, and is now entitled to his release. * * *
>
> "The respondent [U. S. Marshal in Philadelphia] is thoroughly familiar with the principle [that living as a parolee under supervision is constructive custody and not liberty] but argues that it is inapplicable in this case since relator was not on parole. The answer to this argument is that while he was not on parole de jure he was so de facto and bound to conduct himself accordingly. We deem such circumstances sufficient to justify application of the same principle."

C. Petitioner's first appeal to the Third Circuit.

The formal order of release was entered on December 22, 1958 (R. 49). No appeal was noted by the

Government until February 19, 1959 (R. 49), and the time for docketing that appeal was extended (R. 49). In fact, the Government's brief and appendix on appeal were not filed in the Third Circuit until May 29, 1959, five months after the formal judgment for petitioner's release.

That court reversed (Appendix E, *infra*, pp. 14a-20a). The Third Circuit agreed that petitioner was entitled to credit toward his prison sentence for the restraints imposed upon him—but only for the time after the probation sentence expired. It found, as a fact, that all of the restraints imposed on petitioner prior to September 3, 1957, related to the probation sentence, notwithstanding the probation officer's statement of two restraints (R. 75).

None the less, in the view of the Third Circuit petitioner was seeking "double credit—for completion of his probation and completion of his sentence of imprisonment for the same reporting to or contact with his probation officer" (Appendix E, *infra*, p. 17a). The Third Circuit did, however, give petitioner credit for 50 days for the period he was under restraints from September 3 to October 23, 1957.

After rehearing was denied, petitioner applied to this Court for certiorari (No. 88, Oct. T. 1959), presenting this single question (Pet. 2):

> "Where the evidence in a case is entirely documentary, and the case is tried to the court sitting without a jury, may a Court of Appeals, exercising a broader scope of review than the 'clearly erroneous' test laid down by Rule 52(a), Federal Rules of Civil Procedure, reject the findings of fact made by the District Court and substitute new findings of its own."

Certiorari was denied (363 U.S. 812) on Monday, June 6, 1960.

D. The Marshal's refusal to take petitioner into custody.

Promptly thereafter, on Friday, June 10, 1960, petitioner offered to surrender to Denny L. Sampson, a Deputy United States Marshal for the District of Nevada at Las Vegas (R. 80-81). In the words of the District Judge in the present case (R. 14-15; 188 F. Supp. at 907):

> "Relator [i.e., the present petitioner] was accompanied by his attorney, Harry E. Claiborne, Esq. Relator told Mr. Sampson that he was surrendering on the strength of the order of the United States Supreme Court, denying certiorari. Mr. Sampson asked relator to have a seat, and went in search of legal advice. He shortly returned and told Mr. Claiborne (who was then in the chambers of Judge Foley of this District [of Nevada], seeking to obtain a writ of habeas corpus for relator) that he, the Marshall, had no authority to hold relator, and accordingly would not do so. On the following Monday, Tuesday, and Wednesday, relator repeatedly attempted to surrender to the Deputy Marshall, who refused to take him into custody without process authorizing such action."

During this period, a Mr. Loveland of the Bureau of Prisons advised the Marshal to accept the prisoner, but then this was countermanded before action was taken. (R. 39, 84-85). Meanwhile, on Monday, June 13, 1960, the Court of Appeals for the Third Circuit issued its mandate pursuant to this Court's denial of certiorari, and on July 5, 1960, the District Court for Eastern Pennsylvania ordered petitioner remanded to the custody of the Attorney General. The District Court's order, drafted by the United States Attorney

for Eastern Pennsylvania, specifically recited that "The time remaining to be served shall be computed in accordance with the Opinion of the United States Court of Appeals for the Third Circuit dated December 9, 1959."

E. Petitioner's present habeas corpus and present appeal to the Ninth Circuit.

Finally, on July 12, 1960, petitioner's surrender was accepted (Appendix A, *infra,* p. 1a), thirty-two days from the time he first attempted surrender. He filed a second petition for habeas corpus (R. 3-8), and was admitted to bail (R. 12, 91). Following a hearing, the District Court for the District of Nevada (Halbert, D. J.) discharged the writ, holding that petitioner was entitled to no credit whatever on any sentence in respect of the restraints imposed by the Probation Officer in 1957, disagreeing in that respect both with the Third Circuit, and with the terms of the order prepared by the Government and issued by the District Court for the Eastern District of Pennsylvania pursuant to the mandate of the Third Circuit (R. 11-24; 188 F. Supp. 905).

On appeal, the Ninth Circuit affirmed. It agreed with Judge Halbert that petitioner was not entitled to immediate release, and hence refused to pass on the correctness of the Third Circuit's holding that he had earned 50 days' credit in 1957. The Ninth Circuit said:

> "This leaves only the period from September 3, 1957, to October 23, 1957, to be considered. This totals 50 days. Inasmuch as even under appellant's calculation there were 110 days left to be served upon his Texas sentence when he was released on bail, he would not now be entitled to be released even if he should be given credit for this

50 days upon his sentence. At this time we express neither approval nor disapproval of the holding of the Third Circuit that appellant was entitled to this 50 days credit.

"The petitioner is only entitled to be released under a writ of habeas corpus if he is illegally restrained of his liberty. Under our holding in this case, and regardless of whether the last-mentioned 50-day period is or is not allowed to appellant, he is not now entitled to be released. A further period of time must be served by appellant in order for him to complete his sentence."

REASONS FOR GRANTING THE WRIT

Petitioner, who has now been released from prison for over four and a half years (except for two days in October 1957 and a single day in July 1960) is sought to be returned to custody for a period that cannot be more than 107 days (less than four months) and who under the ruling of another Court of Appeals should not be required to serve more than 57 days (less than two months). Such a course flies in the face of a clearly expressed Congressional policy. Moreover, despite persistent litigation in which are reflected plainly unjustifiable delays by Government officers that aggregate 90 days, there is still no authoritative ruling as to the extent of his obligation. Considerations of justice no less than of sound judicial administration require the intervention of this Court to terminate a course of action that, certainly at this juncture appears to reflect overzealousness than any effort to reassert the symmetry of the law.

First. The Third Circuit gave petitioner credit for 50 days in respect of the restraint imposed on him by a duly authorized Probation Officer in 1957. The Dis-

trict Court in this case held he was not entitled to such credit, and the Ninth Circuit flatly refused to resolve the difference. Thus, if the judgment below stands unreviewed and petitioner once surrenders for a third time, the custodial officers who take him in charge are without guidance as to his proper release date, and he will necessarily be required to bring still a third petition for habeas corpus.

This circumstance, we submit, warrants and indeed requires review. Just as in patent cases a conflict between two circuits concerning the validity or otherwise of the identical patent is a ground for granting certiorari, even when the decision of either court standing alone would not be reexamined here—see Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (Kurland & Wolfson ed. 1951) § 354, where the rulings are collected—so here, where two circuits have rendered differing opinions as to the proper length of a single sentence imposed upon a single individual, resolution of the conflict by this Court is appropriate as a matter of orderly judicial administration.

Second. The decision of the court below, denying petitioner credit for the 58 days between his discharge by the District Court for the Eastern District of Pennsylvania and the notice of appeal by the Government, is in direct conflict with the decisions of the Court of Appeals for the District of Columbia, *Harris* v. *Lang*, 27 App. D.C. 84 (1906), of the Court of Appeals for the Tenth Circuit, *White* v. *Pearlman*, 42 F. 2d 788 (C.A. 10, 1930), and of the Court of Appeals for the Second Circuit, *United States* v. *Greenhaus*, 89 F. 2d 634 (C.A. 2, 1937). It is also contrary to the provisions of 18 U.S.C. § 3568. Moreover, the decision be-

low was inconsistent with prior decisions of the same court. *Smith* v. *Swope,* 91 F. 2d 260 (C.A. 9, 1937); *Albori* v. *United States,* 67 F. 2d 4 (C.A. 9, 1933).

Harris v. *Lang, supra,* involved virtually an identical situation to the present case. In *Harris,* the lower court granted a petition for habeas corpus, as was true in the present case. As here, the United States appealed but the Court of Appeals dismissed. The court held in *Harris,* that despite the appeal, the underlying sentences continued to run and had expired by the time of the court's opinion. Therefore, even though the court concluded that the lower court had erroneously released the prisoner, "and, although he did not serve the full period of his imprisonment by reason of his discharge by the court below, the time which he lawfully should have served has now expired. To direct reversal of the order of the court below would be to do a vain thing." 27 App. D.C. at 93. The court below held that petitioner's sentence did not continue to run even to the filing of the Government's notice of appeal. The decisions are in direct conflict with each other.

White v. *Pearlman, supra,* also involved an erroneous release of a prisoner prior to expiration of his term. There, a federal prisoner, although he had been sentenced to five years, was released from prison after a little more than a year through an error by the warden. Two years later federal authorities committed him to Leavenworth Penitentiary to serve his sentence. On petition for habeas corpus, the prisoner claimed and received credit toward his sentence for the two-year period when he had been at liberty. The mistake of the warden there is precisely comparable to the error, so deemed by the Third Circuit, of the District Court for the Eastern District of Pennsylvania. Both the

warden in *White* and the District Judge concluded that the prisoner had served his sentence and released him. The Tenth Circuit held that the sentence continued to run. The court below held to the contrary. The decisions are in direct conflict with each other.

United States v. *Greenhaus, supra,* is identical to *White* v. *Pearlman* in all essential respects. The warden mistakenly released a prisoner who had been sentenced to eight years in the belief that his sentence was only three years. The Court of Appeals for the Second Circuit held that the *prisoner was entitled to credit toward his sentence for the time he was at large* until the error was discovered. The court below held to the contrary. The decisions are in direct conflict with each other.

The decision of the court below is also inconsistent with its own earlier decisions in *Smith* v. *Swope,* 91 F. 2d 260 (C.A. 9, 1937), and *Albori* v. *United States,* 67 F. 2d 4 (C.A. 9, 1933). In each of these, following imposition of a prison sentence by a federal court the prisoner was surrendered erroneously to state authorities and imprisoned for a state offense. The Ninth Circuit held that the federal sentences began to run when imposed and, notwithstanding that they had not been served, the sentences had expired. Those decisions are completely inconsistent with the decision below in the present case where the court held that petitioner can only receive credit if he was in federal custody, "either constructively or otherwise."

The court below relied upon its prior decision in *Patterson* v. *Jones,* 141 F. 2d 319 (C.A. 9, 1944) which recognizes the conflict. That case is clearly distinguishable. In that case, a federal prisoner was released by a District Court on habeas corpus on November 5,

1942. The prisoner claimed credit for all the time from November 5 until April 29, 1943, the date the District Judge signed the Citation on Appeal. But in that case the Government had filed notice of appeal on January 29, 1943. Under the Federal Rules of Civil Procedure this had the effect of staying the judgment. While an ordinary litigant is required by Rule 62(d) to file a supersedeas bond in order to stay a judgment, the United States is not required to give such a bond. Rule 62(e). The notice of appeal was enough for a stay of judgment in *Patterson*, and it is not argued in the present case that petitioner is entitled to credit for any time after the Government filed its notice of appeal. The difference is that in *Patterson* not sufficient time had elapsed prior to the filing of the notice of appeal to terminate the sentence, while here the fifty-eight days did completely run the balance of the sentence.

It is well to note that the Government did not have to permit the sentence to run pending its decision whether or not to appeal. The United States could have sought a stay of the effective date of the District Court order pending appeal. This was precisely what was done and the basis for the decision in *Hunter* v. *McDonald*, 159 F. 2d 861 (C.A. 10, 1947), cert. denied, 331 U.S. 853 (1947).

Furthermore, 18 U.S.C. § 3568 provides that the sentence of imprisonment "shall commence to run from the date on which such person is received at the penitentiary, reformatory or jail for service of said sentence.

"No sentence shall provide any other method of computing the term."

A sentence of imprisonment is stayed only if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail. F. R. Crim. P. Rule 38(a)(2). Indeed if one elects not to commence service he is given no credit for the time he remains in jail. *Baker* v. *Hunter*, 142 F. 2d 615 (C.A. 10), cert. denied 323 U.S. 740; *United States* v. *Cortese*, 244 F. 2d 872 (C.A. 2).

Relator having originally elected to commence service and not being on bail after December 23, 1958, the date of the Court's order, the sentence of imprisonment is not stayed but continues to run and relator is entitled to insist on the benefits of this statute. *Bruno* v. *United States*, 308 U.S. 287 (1939).

Clearly this conflict should be resolved. The issue is one of obvious importance in the administration of federal criminal law. Moreover, it is a question of individual liberty, not only to petitioner, but to others like him. A cardinal principle of criminal law is that once a prisoner's sentence has commenced to run, it continues to run unless there is some valid supervening occurrence. This conflict squarely raises the question whether an erroneous discharge of a prisoner by a District Court is such an event.

Third. This case presents the remarkable and incongruous situation of having *within itself* a conflict among the federal courts of two circuits. The conflict, moreover, concerns a vital question, the jurisdictional power of federal appellate courts in habeas corpus proceedings. The combination of these factors adds up to a question of great importance which ought to be resolved by this Court.

The Court of Appeals for the Third Circuit held that petitioner was entitled to credit toward his prison sentence for the restraint improperly exercised by a United States Probation Officer between September 3rd and October 23rd, 1957. 273 F. 2d 495 (C.A. 3, 1959). To this extent, the Court of Appeals affirmed a District Court decision, holding that petitioner was entitled to credit for a longer period of time, commencing in March, 1957, so that his prison sentence had expired and he was entitled to be discharged. The Court of Appeals disagreed on the period prior to September 3rd. This left some 58 days to be served on the prison sentence so that the judgment of the Court of Appeals was a reversal of the court below.

In the present proceedings, the District Court in Nevada held that the Third Circuit had exceeded its jurisdiction in finding petitioner entitled to credit for the time subsequent to September 3rd. The principle apparently relied upon was this: the Court of Appeals lacks jurisdiction to deal with any intermediate issue that does not entitle the petitioner to his immediate release. The District Court then announced that it respectfully disagreed with the Third Circuit and that petitioner is not entitled to credit for the time after September 3rd. By failing to either disapprove or approve of this decision, the Ninth Circuit left standing the lower court's conclusions on the jurisdictional issue and petitioner's claim of credit for this period.

Apart from the conflict between the two circuits and its peculiarly painful effect upon petitioner, the issue posed is an important one which ought to be resolved by this Court. A question of jurisdiction of the courts is always basic and pervasive. When, as here, the issue of the jurisdiction of the federal appellate courts

in connection with the Great Writ of liberty, it is even more imperative that the matter be determined by the highest Court.

Section 2106 of the Judicial Code, 28 U.S.C. § 2106, provides that:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

This broad grant of power is challenged in this case. The decision of the court below is inconsistent with this Court's own decision in another habeas corpus case, *Dowd* v. *United States ex rel. Cook*, 340 U.S. 206 (1951). There, the lower courts had ordered the state prisoner released on habeas corpus, but this Court vacated that judgment in order to permit the state court to reconsider the case. This intermediate, conditional judgment was authorized by § 2106. A recent Fifth Circuit case openly relied upon § 2106 to modify a district court decision in a habeas corpus case. *McKenna* v. *Ellis*, 289 F. 2d 928 (C.A. 5, 1961).

The question posed is obviously one of substantial importance. It can be answered effectively and conclusively only by this Court.

Fourth. "[T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." *Ex parte Lange*, 18 Wall. (85 U.S.) 163, 173. Petitioner herein contends that he is being twice punished

for the same offense. His claim rests upon the fact, which cannot be denied, that a United States Probation Officer, acting in his official capacity, subjected petitioner to restraint from March to October 1957 in connection with a prison sentence which had less than four months to run. Petitioner claims, as a matter of simple equity, and on the strength of the Fifth Amendment of the United States Constitution, that he cannot be further punished for that offense.

While free on bail from a prison sentence with three months and 20 days to be served prior to the mandatory release date, petitioner was treated by the Probation Officer as if he had been released on parole or conditional release. The Probation Officer erroneously ordered petitioner to report not less than once a week (even though he was told by the Court to treat him as an ordinary probationer, he did not do so (R. 44)), and this reporting continued for over seven months.

The Government has a standard response which has been used time and again with varying success. According to the Government, it all turns on the fact that the Probation Officer did not have authority[1] to impose

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[1] The district court in Nevada stated that the Court of Appeals for the Third Circuit was in error in holding that the improper actions of a probation officer is indistinguishable from those of marshals, wardens or other officers, because the probation officer was "without any authority" to restrain petitioner. The short answer is found in the applicable statutes, 18 U.S.C. §§ 3653-3656, and the U.S. Probation Officers Manual, p. 34, which reads as follows: "In the performance of his duties in connection with probation the probation officer is regarded as the official representative of the United States District Court and the Administrative Office of the United States Courts; and in the performance of his duties in connection with parole investigations and supervision he is regarded as the official representative of the Department of Justice."

any restraints on petitioner. The Government consistently refuses to acknowledge that a federal official, acting in his official capacity, can do something he is not "authorized" to do, *i.e.*, make a mistake, and still bind the Government.

Through this monotonous incantation of the word "authority" the Government conveniently ignores the whole line of cases in the Courts of Appeals and District Courts which have held in favor of prisoners seeking relief on the basis of mistakes or errors by federal officers acting in their official capacities. *E.g.*, *Smith* v. *Swope*, 91 F. 2d 260 (C.A. 9, 1937); *United States* v. *Greenhaus*, 89 F. 2d 634 (C.A. 2, 1937); *Albori* v. *United States*, 67 F. 2d 4 (C.A. 9, 1933); *White* v. *Pearlman*, 42 F. 2d 788 (C.A. 10, 1930); *Price* v. *McGuiness*, 269 Fed. 977 (C.A. 3, 1920); *Harris* v. *Lang*, 27 App. D.C. 84 (C.A.D.C. 1906); *United States* v. *Jones*, 147 F. Supp. 268 (D. Md. 1957); *In re Jennings*, 118 Fed. 479 (E.D. Mo. 1902). Compare *Stetson* v. *Mahoney*, 42 F. Supp. 298 (E.D. Wash. 1942). No attempt is ever made really to distinguish these cases. If their existence is recognized, the Government will conveniently conclude that, *contrary to the argument it advanced at the time they were decided*, the federal officials in each one of them had "authority."

The definition of "authority" in the lexicon of the Government seems to be this: if the prisoner wins, the officer had "authority"; if the Government wins, he did not. The bitter irony is that this thin veneer of an argument has so far prevented petitioner from receiving the credit to which he is entitled for the sentence he has already served.[2]

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[2] Acceptance of the foregoing contentions in no sense involves the proposition that the Government has so consistently argued in this case, viz., that the Probation Officer could not grant petitioner

The issue of human liberty presented here is an important one. It has Constitutional significance. The Government will obviously go on ignoring or spuriously distinguishing lower court decisions until such time as this Court considers the problem of the effect upon a prisoner's sentence of an error by a federal officer acting in his official capacity.

Finally, this case lends itself to summary disposition under a formula espoused by the Fifth Circuit that was here rejected by the Ninth.

In *Powell* v. *Wiman*, 287 F. 2d 275, 282, the Fifth Circuit granted relief in a somewhat similar situation under the terms of the habeas corpus statute, as follows:

> "Powell has now been imprisoned for more than five years. With good time and other allowances, his sentence will probably expire within less than another year. The Court's duty upon a habeas corpus is to 'dispose of the matter as law and justice require.' 28 U.S.C.A. § 2243; cf. 28 U.S.C.A. § 2106. From the present record, without more, it would appear that Powell's discharge will best serve the ends of justice."

So here: This petitioner's sentence is, at the outside, far less than a year. If the Third Circuit is right, it is 57 days, less than two months.[3] If the District Court

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parole. Petitioner has never for a moment contended the contrary. His position is that, not that he was ever a parolee, but that, since parole and conditional release are equivalents by statute (18 U.S.C. § 4164), and since he was subjected to actual restraints that amounted to ameliorated imprisonment, he has already served more time than he was required to serve.

[3] When released in March 1957, petitioner had 3 months and 20 days to be served—110 days. He was in custody on October 16 and 17, 1957, in Philadelphia, and on July 12, 1957, at Las Vegas, which reduces the time to 107 days. The Third Circuit gave him credit for 50 days, making the total 57 days.

for Nevada is right (and the court below did not disturb its judgment), then 107 days remain, less than four months.

The courts have indicated that there is a policy against requiring any prisoner to serve his time in installments. *White* v. *Pearlman*, 42 F. 2d 788, 789 (C.A. 10); *United States* v. *O'Donovan*, 107 F. Supp. 347, 350 (E.D. Ill.); *McDonald* v. *Lee*, 217 F. 2d 619, 623 (C.A. 5), vacated because moot, 349 U.S. 948.

Petitioner's release without more is additionally appropriate because the record reflects unjustifiable delay in this matter on the part of the Government, amounting to some 90 days.

We do not include in that computation the 58 days the Government took to note the first appeal (R. 49), for that was within the 60 days allowed by Rule 73(a), F. R. Civ. P., in Government cases. We do include, however, its 58-day delay in filing the record and brief on the first appeal.[4] And we similarly include the 32 days' delay in accepting petitioner in custody following the conclusion of the first appeal, from June 10 to July 12, 1960.

There was no justification for the Nevada Marshal's refusal to accept petitioner. This was his duty and no further commitment was necessary. Cf. *Hill* v. *Wampler*, 298 U.S. 460, 465 (1936). The Marshal in Philadelphia accepted petitioner's surrender on Octo-

[4] Rule 21(1) of the Third Circuit incorporates the 40-day period of Rule 73(g), F. R. Civ. P. Since the first appeal was noted on February 19, 1959, that period would expire on April 1. In fact, the Government's brief and appendix were not filed in the Third Circuit until May 29—58 days later, or 98 days after the appeal was noted.

ber 16, 1957, two days after this Court's denial of certiorari in *Binion* v. *United States*, 355 U.S. 834; there was no reason whatever why the Marshal in Las Vegas should not similarly have accepted petitioner four days after this Court's denial of certiorari in *Binion* v. *O'Brien*, 363 U.S. 812. The latter Marshal's testimony (R. 85) that "it might constitute an illegal arrest" to take one who voluntarily surrendered, clearly a belated excuse, reflects no legal reason but only official irresponsibility. It scarcely needs to be added that, on this Court's denial of a petition for certiorari, no formal mandate issues. Rule 25(2).

Since, therefore, assuming, *arguendo*, only 107 or 57 days remain to be served, and since the Government has been responsible, without justification, for delays aggregating 90 days, we submit that, as in *Powell* v. *Wiman*, 287 F. 2d 275, *supra*, justice requires that this Court grant certiorari, reverse the judgment below, and, on the authority of 28 U.S.C. § 2243, direct that petitioner be released forthwith.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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